employment, as he sees fit; but in practice it is to the employee very often a matter of compulsion, and not of free choice . . . his necessities may easily be made use of as a means of coereion." Most courts refuse to recognize that economic pressure can be the means of coercion, relying upon the theoretical equality of employer and employee. The principal case reflects the important changes that are occurring in the industrial world. Laws of the state seeking to remedy evils and establish harmony between the classes should be upheld even where the liberty of the individual is subjected to certain restraints, provided such restraints are not arbitrary.[11]

I. B.

TORTS—DOCTRINE OF THE LAST CLEAR CHANCE—An interesting variation of the application of the so-called doctrine of the "last clear chance" is found in a recent decision of the Connecticut court of last resort. In *Nehring* v. *Connecticut Co.*[1] the plaintiff negligently placed himself in a dangerous position and carelessly continued to remain therein until he was injured by the defendant company, who, however, owing to gross negligence, failed to observe the plaintiff's situation until too late to avoid the injury. The Supreme Court, in a well-considered decision, held that the proximate cause of injury was the plaintiff's want of due care and not the lack of due care on the part of the defendant and accordingly, in offering a non-suit, declared that the doctrine of the "last clear chance" did not apply.

Few rules of law appear to be more difficult to apply correctly than this principle referred to. Fundamentally, it is the result of the revolt of the early nineteenth century courts against the hardship involved by the contributory negligence rule as it then existed and is predicated on the theory that an act of negligence or trespass committed by the plaintiff should not deprive him *ipso facto* of all rights to safety and security by removing all legal redress for whatever should subsequently befall him at the hands of the defendant. The theory just stated is clearly shown in the early leading cases of *Lynch* v. *Nurdin*[2] and *Bird* v. *Holbrook*;[3] and the doctrine of the "last clear chance" finally crystallized out in concrete form in the famous "donkey case" of *Davies* v.

---

[11] In McLean v. Arkansas, 211 U. S. 539, 547 (1909), the court, in a decision sustaining an act requiring coal to be measured for payment of miners' wages before screening, said, "It is then the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the Government in the exercise of its power to protect the safety, health and welfare of the people. It is also true that the police power of the State is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution."

[1] 84 Atl. Rep. 301 (Conn., 1912).
[2] 1 A. & E. (N. S.) 35 (1841).
[3] 4 Bing. 268 (1828).

Mann[4] where Lord Abinger, C. B., said, "As the defendant might, by proper care, have avoided injuring the animal . . . he is liable for the consequences of his negligence, though the animal may have been improperly there."[5] Thus it clearly follows that this negligence or omission of the party last in fault, must be regarded as constituting, the sole proximate cause of the injury, and the antecedent negligence of the plaintiff must be disregarded as being too remote.[6] Thus, the real function of the doctrine of the "last clear chance" is merely to strip from the negligence of the plaintiff the attribute expressed by the word "contributory" by finding that the defendant's acts were the sole proximate cause of the accident;[7] and unless it is so found, the doctrine can never apply.

While easily formulated, the rule is in reality of such an abstract metaphysical character as to furnish considerable difficulty in practical application; and upon some of its subdivisions the cases are in great confusion. It is true that practically all jurisdictions[8] allow recovery for an injury caused by the defendant's negligence, notwithstanding the fact that the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after[9] becoming aware of the plaintiff's danger, to use ordinary care[10] for the purpose of avoiding injury to him. When, however, this principle has been extended in any way, the decisions become at variance.

In considering the various situations which arise under the rule, the first question which naturally arises is as to whether or not the negligence of the defendant is sufficient to bring the case within the rule if it consists of some act or omission occurring

---

[4] 10 M. & W. 545 (1855); see also Radley v. R. R. Co., L. R. 1 App. Cas. 754 (1876).

[5] Or, as stated by Lord Penzance in Radley v. R. R. Co., *supra:* "If the defendant could in the result by the exercise of ordinary care and diligence have avoided the mischief, then the plaintiff's negligence will not excuse him."

[6] "The party who has the last opportunity of avoiding the accident is not excused by the negligence of anyone else. His negligence and not that of the one first in fault is the sole proximate cause of the injury." 1 Shearm & Redf. Neg. (5th Cd.) sec. 99.

[7] "The one that had the last clear opportunity to avoid the accident . . . is solely responsible for it . . . his negligence being deemed the direct and proximate cause of it." 1 Thomp. Neg. 230.

[8] See summary of cases given in Shearm & Redf. Neg., sec. 99, where the rulings of all the American jurisdictions are collected.

[9] It is a fundamental principle of the doctrine that the defendant's negligent act must be after or his omission must continue subsequent to the plaintiff's negligence. Thus no recovery can be allowed for the killing of a trespasser due to lack of adequate brakes on a train, since this negligent condition was prior to the plaintiff's act. Smith v. Norfolk, etc. R. Co., 114 N. C. 728 (1894); and *vide* Sullivan v. Miss. Pac. R. Co., 117 Mo. 214 (1893).

[10] It seems settled that a charge that the defendant is liable unless its servants did everything in their power to prevent the accident is too narrow and is good cause for a new trial. Mobile R. Co. v. Watly, 69 Miss. 145 (1891); Norfolk etc. R. C. v. Dunnaway, 93 Va. 29 (1898).

before the discovery of the plaintiff's peril. If the negligent act of the defendant occurred before the plaintiff's negligence the cases seem to hold that the doctrine of the "last clear chance" cannot be raised; but there is a great conflict of cases as to the true rule when the defendant has been guilty of some omission of duty which prevented the plaintiff's part from being noticed in time to avoid the injury. Many of the cases take the view that here the doctrine of the last clear chance is founded upon actual knowledge of the plaintiff's danger, irrespective of whether or not it was the defendant's duty to have provided means of knowledge[12] and a few jurisdictions hold that under this doctrine the defendant is liable only if chargeable with wanton fault or recklessness.[13] It is submitted that both these views are not only incorrect from the point of view of law and logic, but are also extremely discreditable to civilized jurisprudence. The violation of a duty owed to the plaintiff to exercise care to discover his exposed situation should certainly not be permitted to defeat his subsequent recovery—a man should not profit by his own wrongful act. The better view and the weight of authority accordingly holds the defendant liable if the injury results from the omission of an act which constituted a breach of duty owed[14] to the plaintiff, whether this breach occurred before or after the discovery of the plaintiff's danger, if it intervened or continued after the negligence of the plaintiff had ceased.[15] In the principal case *ante*, it is true that the breach of duty owed to the plaintiff continued practically up to the time of the injury, but the plaintiff's own negligence also continued until the accident occurred and consequently the Connecticut court rightly decided that the defendant's negligence was not the sole proximate cause and accordingly affirmed the non-suit of the lower court.

P. C. M. Jr.

TRUSTS—BANK DEPOSIT BY TRUSTEE—*Smith* v. *Fuller*,[1] in the Ohio Supreme Court, is a recent case denying the right of a trustee winding up the affairs of a defunct savings fund to deposit the

[11] *Vide* note 9, *supra*.

[12] N. Y., N. H. & H. Ry. Co. v. Kelley, 93 Fed. 745 (1899); Sweeney v. N. Y. Steam Co. 117 N. Y. 642 (1890); Milwaukee etc. Co. v. Torch, 108 Wis. 593 (1901); Barnett v. Chicago & N. W. Ry. Co., 132 N. W. Rep. 973 (Ia., 1911); and the decisions in Arkansas, Colorado and Montana.

[13] Frazer v. Ala. R. Co., 80 Ala. 105 (1886); Mulhein v. D. L. & W. R. Co., 81 Pa. 366 (1877); and cases in Indiana, Louisana and Oregon.

[14] Some of the courts have gone astray on this point, and have failed to distinguish between a breach of a duty owed and conduct amounting to wanton fault or recklessness.

[15] Smith v. N. & S. R. Co., 114 N. C. 728 (1894); Richmond v. Sacramento Valley R. Co., 18 Cal. 351 (1861); Battesbull v. Humphreys, 64 Mich. 514 (1889); Edgerly v. Street R. Co., 67 N. H. 312 (1894); Virginia Md. R. Co. v. White, 84 Va. 498 (1889); and the decisions in Kansas, Kentucky, Maryland, Mississippi, Nevada, Utah and W. Virginia.

[1] 99 N. E. Rep. 214 (Ohio, 1912).